

Court proceedings. Nevertheless, that Court granted probate of the will. . . .

[Reference to *Sutton v. Sadler*, 3 C.B.N.S. 87, 98; *Smell v. Smell*, L.R. 5 P. & M. 84.]

In this case, the defendant having given such proof of the testator's capacity as to satisfy the Surrogate Court, it is for the plaintiff now, who alleges incapacity, to prove it.

The plaintiff's contention is, that as early as the month of February, 1907, the testator was suffering from general paresis, and that he continued a paretic, deteriorating mentally, until his death, and was, in consequence, incompetent to make either of the wills in question.

Different classes of evidence were adduced at the trial, namely, evidence of experts as to the testamentary capacity of a paretic, and in regard to the testator's probable capacity, evidence of his actual capacity as exhibited by him in his business affairs, and evidence as to his general conduct and demeanour. . . .

[Summary of the testimony.]

I am of opinion that not only has the plaintiff failed to shew testamentary incapacity on the part of the testator, but the defendant has affirmatively established his capacity, at least as late as September, 1908; and there is no evidence shewing incapacity when the will of June, 1909, was executed.

If I entertained any doubt as to the weight to be attached to the medical testimony, that doubt would disappear in favour of testamentary capacity when the evidence furnished by the business dealings of the testator . . . was cast into the scale. Opinion evidence as to the testator's incapacity is unconvincing in the face of his capacity as proved by his actual conduct. . . .

This appeal should be dismissed with costs.

CLUTE, SUTHERLAND, and LEITCH, J.J., concurred.

RIDDELL, J.:— . . . It was suggested before us, for the defendant, that the High Court has no jurisdiction in the premises. . . . I think that the express words of sec. 38 of the Judicature Act cannot be got over by any implication arising from the omission upon the last revision, in 1910—10 Edw. VII. ch. 31, sec. 19—of the final clause in R.S.O. 1897 ch. 59, sec. 17. The same section also disposes of the plea of *res adjudicata*, in the circumstances of this case.

A decree of a Court of Probate establishing a will is said to be a judgment in *rem*, binding all the world: *Halsbury's Laws of*